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NO. 90-1748

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JERRY R. WILLIAMS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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In this case, the Fifth Circuit held that since Petitioner was under a legal duty to correct a Form W-4 on file with his employer, his failure to correct or amend that form constituted an affirmative act elevating his misdemeanor failure to file to a felony attempted evasion of tax. (Pet. App. 13a.) The United States in its Brief completely abandons and ignores the Fifth Circuit's reasoning, thereby tacitly conceding that the appellate court's rationale is erroneous and contrary to this Court's holding in *Spies v. United States*, 317 U.S. 492 (1943).

Instead, the Government seeks to support the judgment below on the basis of a different argument, never previously advanced in this case. As the Fifth Circuit recognized (Pet. App. 12a), once a Form W–4 is filed with an employer there is nothing whatsoever the employee normally must do to maintain that W–4 on file; it remains effective unless and until amended or withdrawn. The United States, however, now contends that although "maintaining" a Form W–4 with an employer normally would not involve any affirmative acts, "an employee *can* take affirmative acts to cause his employer to maintain a false Form W–4 in effect." (Br. 4, emphasis supplied.) While it is possible that, under unusual circumstances, an employee could, by some affirmative act, attempt to maintain a W–4 on file,[1] the Petitioner, the prosecutor (4 Tr. 102–103; 5 Tr. 17–18; Doc. 41 at 4), and the Fifth Circuit (Pet. App. 13a), here all understood "maintaining on file" in its normal context to refer simply to Williams' failure to withdraw or amend that form. Indeed, the Government expressly told the jury that Williams was under a legal duty to amend or withdraw the Form W–4 on file, that he did not so, and that his failure to do so was an affirmative act. (5 Tr. 17–18.) Having thus caused the jury to understand that Williams' failure to correct the Form W–4 on file is an affirmative act, the Government cannot now justify the conviction based on a new and unlikely interpretation of the indictment.

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[1] For example, if any employer were to ask an employee whether his Form W–4 should remain on file, the employee's affirmative answer presumably could be such an act. No such act occurred here.

But even if the Government had clearly charged Williams with "maintaining [the form] on file" through some affirmative act, that would still not justify his conviction, since the Government entirely failed to prove any affirmative act committed by Williams to maintain the Form W–4 on file. The "acts" suggested by the Government in a footnote (Br. 4–5 n. 1) plainly are irrelevant--filing the Form W–4 initially is a prerequisite and plainly cannot be an act *maintaining* that form on file,[2] and Williams' alleged lie to an IRS agent years after the fact likewise had nothing whatsoever to do with maintaining that form on file with his employer.[3] Under *Spies, supra*, a conviction cannot be sustained where the Government does not prove an affirmative act.

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[2] Despite the fact that it is blackletter law that Counts II and III must stand on their own as if Count I was not included in the indictment, (Pet. Br. 8), the Government improperly seeks to rely on Count I, which refers to the *filing* of a false Form W–4, to sustain the other counts. (Gov. Br. 3.) Similarly, the Government discusses Counts II and III as if they charged that Williams "maintain[ed] a *false* Form W–4 in effect" (Gov. Br. 4), when in fact only Count I charged that the form was false. (See Pet. Br. 8 n.7.)

[3] Furthermore, as the court of appeals below noted, "We do not consider whether Williams' subsequent false statements to the revenue agent constituted affirmative acts; *no mention of such statements was contained in the indictment*." (Pet. App. 15a n. 7, emphasis supplied.)

CONCLUSION

Since the Government has in effect conceded that the Fifth Circuit's rationale conflicts with *Spies* and has failed to advance any alternative rationale justifying the judgment below, summary reversal may be appropriate.

Respectfully submitted,

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